United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1268

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United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JACK L. CHESTNUT,
Defendant-Appellant.

APPEAL FROM UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
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IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 75-1268

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JACK L. CHESTNUT,

Defendant-Appellant.

APPELLANT'S BRIEF

PRELIMINARY STATEMENT

The judgment and conviction and orders appealed from were entered by the Honorable Edward Weinfeld, Judge of District Court, Southern District of New York. The court's opinion ruling on pre-trial motions is reported: *United States v. Chestnut*, 394 F.Supp. 581 (S.D.N.Y. 1975). An opinion on post trial motions is not reported, but is found in the Appendix, p. 787 *et seq.*

ISSUES PRESENTED FOR REVIEW

I. Whether a willful violation for causing another to receive a corporate contribution was proved beyond a reasonable doubt, where there was no evidence the defendant saw the checks in question or knew they were drawn on a corporate account rather than the proper political fund, where no motive was shown, and where the evidence showed that the checks would normally not have come to the defendant's attention?

II. Whether venue of the offense of causing another to receive an unlawful contribution in New York was proved where every act of causation by the defendant was elsewhere, where the agreement which constitutes the offense was made elsewhere, where the actual receipt by the third party was (so far as the evidence showed) elsewhere, and where the only nexus to New York was the deposit of the payment in a New York bank?

III. Whether the applicable versions of 18 U.S.C. §§591 and 610 were unconstitutionally vague as applied to receivers of contributions because the controlling definitions required men of common intelligence to guess and differ as to whether a given transaction was an "expenditure" (lawful to receive) or a "contribution" (unlawful to receive)?

IV. Whether the indictment and the evidence failed to state or to prove an offense under 18 U.S.C. §§591 and 610 properly construed because the payment described was not a "contribution" but an "expenditure" which it was not unlawful to receive?

V. Whether the indictment for a 1970 offense was ex post facto because drawn and returned under a 1972 enactment?

VI. Whether it was prejudicial error to allow a lay witness to give an incorrect and foundationless opinion over objection as to the illegality of certain transactions, and to refuse to instruct the jury upon request as to the law applicable to those transactions?

STATEMENT OF THE CASE

A. The Nature of the Case

This appeal is from a conviction after jury trial, for a felony violation of 18 U.S.C. §§2, and 610: that Mr. Chestnut caused Lennen & Newell, an advertising agency, to receive a corpo-

rate "contribution" (in the form of payment for services to Hubert Humphrey's 1970 senatorial campaign) from Associated Milk Producers, Inc., (AMPI).

B. The Course of the Proceedings

The indictment was filed December 23, 1974. (The prosecution would have been barred after December 31, 1974, by statute of limitations.) [1]

Arraignment was January 6, 1975; a plea of not guilty was entered; Pre-trial motions to dismiss the indictment and for discovery and a bill of particulars were filed January 29, 1975; argued February 4, 1975; (App. 13-85) and denied (except to the extent consented to by the Government) by opinion reported at 394 F.Supp. 581. A motion to transfer the proceedings to the District of Minnesota was filed April 24, 1975, heard and denied by order filed May 1, 1975. (App. 91-106) Motions to suppress evidence of other alleged misconduct, to dismiss the indictment on grounds of duplicity and to require the Government to elect which offense to try were heard and denied on May 5, 1975. (The Government, however, elected one offense before submission of the case to the jury.) (App. 589) The jury trial began May 5, 1975 and continued until May 8, 1975 when the verdict of guilty was returned. (App. 116-696) Motions for judgment of acquittal, a new trial and arrest of judgment were filed May 16, 1975, argued, and denied by opinion filed June 25, 1975.[2]

C. Disposition in the Court Below

On June 26, 1975, Mr. Chestnut was sentenced to imprisonment for four months and to pay a fine of $5,000. (App. 804 *et seq.*) He is released pending appeal.

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[1] See Addendum for text of the statute of limitations. The conduct for which Mr. Chestnut was convicted took place between March 1 and June 25, 1970.

[2] The June 25, 1975, opinion is not yet reported but is included in the Appendix.

D. Statement of Facts

1. The Indictment

The Watergate Special Prosecutor presented this matter to the Grand Jury of the Southern District of New York.[3] The indictment alleged that:

> 5. From on or about March 1, 1970, to on or about June 25, 1970, in the Southern District of New York and elsewhere, JACK L. CHESTNUT, THE DEFENDANT, unlawfully, willfully and knowingly did accept and receive and did cause Lennen & Newell, Inc., an advertising firm providing services to the Humphrey campaign described in paragraph 3, to accept and receive a corporate contribution from AMPI on behalf of the aforesaid Humphrey campaign in connection with the elections described in paragraph 2 in that he (1) arranged with officials of AMPI that AMPI would make payment for one month's services rendered to the Humphrey campaign by Lennen & Newell, Inc., (2) arranged with an official of Lennen & Newell, Inc. that Lennen & Newell, Inc. would prepare invoices for $12,000.00 addressed to AMPI for one month's services rendered to the Humphrey campaign, (3) forwarded and caused to be forwarded said invoices to AMPI, and (4) forwarded and caused to be forwarded to Lennen & Newell, Inc., two checks drawn on corporate accounts of AMPI dated June 1, 1970, and June 11, 1970, respectively, each in the amount of

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[3] The Special Prosecutor requested authority from Attorney General Saxbe to investigate AMPI activities from 1969-1972 (App. 5); the latter, noting that "campaign contributions and related violations occurring during the period 1969-1971 would not normally fall within your jurisdiction," agreed to the delegation under Department of Justice Order 551-73 (App. 7). By letter of January 22, 1975, Ruth delegated trial of the case to Mr. Paul Curran, U.S. Attorney (App. 8). Evidence was first presented to a District of Columbia Grand Jury.

$6,000.00 and each made payable to Lennen & Newell, Inc.

(Title 18, United States Code, Sections 610 and 2)

The indictment was released and provided to Mr. Chestnut with a cover sheet (App. 9) reading in part as follows:

NAME: JACK L. CHESTNUT

AGE: 42

ADDRESS: MINNEAPOLIS, MINN.

CHARGE: ONE COUNT. Willful violation of 18 USC Section 610, illegal campaign contribution. (18 USC Sections 2 and 610).

PENALTY: Maximum of two years in prison or a fine of $10,000 or both.

A COPY OF THE INDICTMENT AND APPROPRIATE STATUTES ARE ATTACHED TO THIS FACT SHEET.

* INDICTMENT HANDED UP IN U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

As promised in the penultimate paragraph, a copy of certain statutes was attached, but not in fact the "appropriate" statutes, which should have been 18 U.S.C. §§610 and 591 as they read in 1970; instead the attached statute was §610 as amended in 1972.[4] (App. 12) The quite different provisions effective in 1970 were not cited in the indictment or attached to it.

The following colloquy occurred upon the hearing on the motion to dismiss the proceedings as ex post facto.

> Mr. Nordby: [Defense counsel] Your Honor, in that regard, may we amend orally our discovery request to ask the Government to tell us, if it knows, or find out

[4] The amendment was Pub.L. 92-225, Title II, §205, 86 Stat. 10. The texts of all the statutes concerned are included in the addendum for convenience of reference.

if it does not, whether the 1972 statute was presented to the grand jury or the 190 [sic: 1970] statute or neither, and whether the indictment was drafted under the 1970 of the 1972 statute? Perhaps the answer is not so difficult to find.

The Court: I am sure whatever the answer is, it won't satisfy you.

Mr. Nordby: I only hope it satisfies the Court.

Mr. Bannigan: Your Honor, all I can say in that regard is I have spoken to Mr. Turcom [sic: Turckheim, assistant Watergate prosecutor] who presented the case to the grand jury, and he advises me that he is fully aware the statute was amended in 1972, but beyond that I am not at liberty to discuss the proceedings in the federal grand jury in this District. (App. 68-69)

Although most of the information requested by the defense was refused, the Government filed a bill of particulars reading as follows:

1. As to Items 1 and 2: In late March or early April, 1970, Chestnut telephonically contacted a representative of Lennen & Newell, Inc. ("L&N") in New York and instructed him to send L&N's monthly bill for services rendered to the Humphrey Campaign to American Milk Producers, Inc. ("AMPI") for payment. In accordance with Chestnut's instruction L&N prepared invoices in New York and sent them to AMPI, New Ulm, Minnesota.

On May 12, 1970, Chestnut, having come into possession of similar invoices, forwarded them to Bob Lilly, at Associated Milk Producers, Inc., 1011 N. W. Military, San Antonio, Texas. On June 1, 1970, Lilly mailed a $6,000 AMPI check, drawn on The Alamo National Bank of San Antonio, Texas and made payable to Lennen & Newell,

Inc., to Chestnut at the latter's law offices in Minneapolis, Minnesota. On June 11, 1970, Lilly sent a second similarly drawn check for $6,000 to Chestnut at the same address. Both of these checks were eventually forwarded to L&N's in New York where they were deposited to L&N's general account at Bankers Trust Company. The first check was deposited in New York on June 8, 1970 and the second on June 22, 1970. (App. 89)

2. The Statutes in Question

At the time of the events in issue the operative statutes read in pertinent part as follows:

18 USC §610. Contributions or expenditures by national banks, corporations or labor organizations

It is unlawful . . . for any corporation . . . to make a contribution or expenditure in connection with any election . . . or for any . . . person to accept or receive any contribution prohibited by this section . . . June 25, 1948, c.645, 62 Stat. 723; May 24, 1949, c.139, §10, 63 Stat. 90; Oct. 31, 1951, c.655, §20(c), 65 Stat. 718.

18 USC §591. Definitions

When used in sections 597, 599, 602, 609 and 610 of this title—

The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;

The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable; . . .

June 25, 1948, c.645, 62 Stat. 719; May 24, 1949, c.139, §9, 63 Stat. 90.

Note that §610 makes it unlawful to *make* both "contributions" and "expenditures", but to *receive* only "contributions", and the two terms were differently defined. Significant amendments have been made to these provisions, which will be discussed in the argument.

3. The Defendant.

Jack Leland Chestnut lives in Shoreview, Minnesota, with his wife and children ages 6, 9, 12 and 15 years. (Trial Transcript, hereafter T. 380, App. 494) [5] After service in the Navy he graduated from the Minnesota Law School in 1959, and was an assistant Minnesota Attorney General, until organizing his own law firm in 1963. (T. 382-384, App. 496-98) Except for occasional voluntary service in political causes, Mr. Chestnut has always been a full-time practicing lawyer; he has never sought public office. (T. 381-387, App. 495-501)

Mr. Chestnut's reputation and standing were established by the testimony of: Monsignor James Healy, a priest and labor economist from Buffalo, New York who had worked with Mr. Chestnut in labor matters (an "excellent" reputation for truth, veracity, honesty and integrity) (T. 353, App. 467); Karl Rolvaag, former Minnesota Governor and Ambassador to Iceland, who knew Mr. Chestnut both as a lawyer and as a deacon in their church (the "highest moral standing" and reputation for honesty and integrity) (T. 452, App. 567); Thomas Tipton, head of a marketing company serving minority consumer agencies (the "highest . . . impeccable" integrity) (T. 459, App. 574); Patrick Foley, former United States Attorney ("excellent and unimpeachable for truth and veracity, for being an upright and honest person," "uniformly admired and respected for honesty and integrity") (T. 462, App.

[5] References to both the reporter's transcript and the Appendix are included to assist in locating either.

577); Earl Cudd, United States Magistrate ("highest reputation for truth and veracity") (T. 464, App. 580); Donald Odden, Minnesota District judge ("impeccable . . . excellent reputation or truth and veracity). (T. 469, App. 584); Neil Riley, Minnesota municipal judge ("There is no more respected member of the Bar of the State of Minnesota.") (T. 467, App. 582).

In 1960 Mr. Chestnut distributed literature for Hubert Humphrey; in 1964 he worked as an "advanceman" in the Senator's campaign, as he did in the 1968 presidential campaign; in early 1970 (the election in question here) he was asked by Mr. Humphrey to be manager of his senatorial campaign and accepted.[6]

As campaign manager his duties were to coordinate the overall strategy, organization and scheduling of the campaign; he reported to an executive committee, and to a financial section, and oversaw clerical staff, as well as groups devoted to issues and speechwriting, public relations and so forth. (T. 390, App. 504) He was not the campaign's financial officer or treasurer; that was Mr. Fred Gates, now deceased. (T. 397, App. 511) Campaign headquarters were in Mr. Chestnut's law office in Minneapolis. (T. 391, App. 505)

Mr. Chestnut's office manager, Mrs. Penny Miller, and a campaign secretary, Mrs. Jennifer Broome, handled his correspondence, both legal and political; they opened all mail and had authority to process correspondence, write letters, sign his name and deposit checks; they were instructed to and did return corporate checks received as campaign contributions.

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[6] Mr. Humphrey, who was called as a Government witness, had been a Minnesota Senator from 1949-1965, Vice-President in the Johnson administration from 1965-1968, an unsuccessful candidate against Richard Nixon for the Presidency in 1968, and a teacher in Minnesota in the interim before the 1970 election. (T. 385-389, App. 499-503)

(T. 356-360, App. 470) Mr. Chestnut was extremely busy and frequently out of the office during this period, (T. 361, App. 475), his political work being part-time and carried on simultaneously with his law practice. (T. 39, App. 155)

Mr. Chestnut sought outside legal advice on various aspects of the campaign from Mr. John French, a Minneapolis lawyer.[7] (T. 407, App. 521) Moreover, Mr. Chestnut's experience as an assistant attorney general included enforcement of the Dairy Unfair Trade Practices Act; he was quite aware of the illegality of corporate contributions and it was the campaign's expressed policy not to accept them. (T. 360, 405-406, 449, App. 474, 519-20, 564) There was in fact evidence of corporate payments which had been returned to donors both in this and other campaigns. (T. 202, 215, 471, Defense Exhibit C, Government Exhibit 15, App. 319, 332, 586)

4. Lennen & Newell

In March the Lennen and Newell advertising agency was retained to do the campaign publicity at a graduated fee beginning at $6,000 per month; Mr. Barry Nova, senior vice president in charge of the account, and one Jerry Gross from L&N, worked out of the Chestnut office, at this time. (T. 395-397, App. 509-511)

5. AMPI, Its Personnel and Political Activities

Associated Milk Producers, Inc., is a co-operative of dairy farmers organized under the Kansas cooperative marketing laws, with headquarters in San Antonio, Texas, and operating in some 22 states including Minnesota. (T. 98-99, 113, App. 217-218, 232) AMPI established the Trust for Agricultural

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[7] Mr. French, a magna cum laude graduate of Harvard Law School, president of the *Harvard Law Review* and clerk to Mr. Justice Frankfurter, had considerable experience in the law governing elections and had been an active Democratic party member himself. (T. 336-337, App. 450-451)

and Political Education (TAPE), a fund of voluntary contributions made by members, a lawful source of political contributions from AMPI. (T. 100-101, App. 219)

AMPI and other cooperatives had in the past supported Mr. Humphrey, whose home is in one of the largest dairy producing counties in the country. (T. 45-46, App. 162-3) In 1970, therefore, Mr. Humphrey personally solicited financial help from AMPI for the campaign, (T. 46, 54A, App. 163, 172), assuming the funds would flow from TAPE; he described his understanding thus:

> A. In the State of Minnesota our farmers that belong to the dairy cooperative such as AMPI, A-M-P-I, Associated Milk Producers, Inc., are asked to contribute voluntarily a certain amount of money into what is known as a political fund. It is similar to what the AFL-CIO has called COPE.
>
> In the instance of AMPI, I believe it was called TAPE, if I am not mistaken, T-A-P-E.
>
> This fund is legal. It is within the frame of Federal and State law. The farmers are not required to contribute, they are asked to contribute, just as a union member is asked to contribute a dollar or $2.
>
> That fund is then available for contributions to candidates for Federal or State office, legal contributions.
>
> Q. Then, Senator, when you indicated that you had solicited funds from AMPI, you had reference, of course, to this voluntary fund called TAPE?
>
> A. Of course, of course. That is the only legal fund.
>
> Q. And they do have, is it not true, that the Dairy Cooperatives do have considerable voluntary funds available to all candidates for public office?
>
> A. In recent years, indeed they have.

Q. But they have made it known, have they not, among those in the political arena, that those funds are available?

. . .

A. Of course it is known and they have made it known. We know it is known because we live with the people that make the contributions. (T. 54-56, App. 171-2)

Mr. Harold Nelson was the General Manager of AMPI in San Antonio; Mr. Bob A. Lilly was his assistant, principally involved in political matters. (T. 95, App. 213) Lilly, testifying under immunity, (T. 169, App. ——), admitted that at Nelson's direction he had made numerous illegal contributions to various candidates, both before and after AMPI established TAPE, (T. 96, 103, App. 214, 222), usually disguised as personal checks to give them the appearance of legality, which were reimbursed from corporate funds. (T. 96, 172, App. 214, 289) The recipients, of course, were not told the payments were illegal, (T. 174, 181, App. 291, 298), and Lilly was instructed that the contributions should be made to appear lawful. (T. 174, App. 291)

After the election of the Republican administration in 1968, Nelson became concerned that AMPI's reputation as a supporter of Democrats should be changed, (T. 175-178, App. 292-95), and he undertook to do at least two things: first, large contributions to Republicans were made, including $100,000 cash delivered to Mr. Herbert Kalmbach in 1969 "to curry favor with the Nixon administration" (T. 105, 175-176, App. 224, 292-93); secondly, contributions to Democrats were disguised and concealed rather than drawn lawfully and openly on TAPE funds because, as Mr. Lilly testified on cross examination:

Q. In 1970 if they had political funds why would they make illegal corporate contributions?

A. Mr. Nelson determined, and he was concerned, that he did not want to expose our political arm, TAPE, of having made large contributions to Democrats that were taking office.

Q. Now, so this is very, very clear, in 1970, although you had political funds available, the reason you did not make contributions out of TAPE to the Humphrey campaign was because you did not want to expose to the Nixon administration that you were making contributions to Democrats?

A. That was Mr. Nelson's instructions. . . . (T. 177-178, App. 294-95)

With this background, we turn now to the events on trial.

6. Mr. Chestnut's Alleged Offense

At a meeting in Minnesota in early 1970 Nelson encouraged Mr. Humphrey to run for the Senate and pledged AMPI support of approximately forty to fifty thousand dollars, Mr. Chestnut recalled. (T. 394, App. 508) (This was shortly after Mr. Chestnut agreed to work on the campaign. T. 36, App. 152) Nelson asked if there were campaign bills AMPI might pay at that time, in particular printing bills; Mr. Chestnut said there were no printing bills, but there were consulting fees due L&N; Nelson agreed that AMPI would pay these and told Mr. Chestnut to discuss it with Lilly, whom Nelson said was "the representative of the political arm" of AMPI. (T. 399, 401-402, App. 513, 515-17) Lilly confirmed that in late April Nelson told him that L&N bills would be arriving and that he should see to it they were paid with AMPI funds, presumably meaning corporate funds. (T. 112, App. 231) Lilly did not recall precisely what he said to Mr. Chestnut when

they made the arrangements (T. 144, App. 262); he referred to them as "AMPI contributions," he said, but did not tell Mr. Chestnut they were unlawful or say they were drawn on "corporate" funds, (except, he said, as this may have been implied in the acronym). (T. 181, 183, App. 298, 300)

Mr. Chestnut could not recall the specifics of the conversations or the ensuing transactions. (T. 402-403, App. 516-17) (The prosecution was more than four and one half years after the events.) He "understood that Associated Milk Producers would make these payments out of their political arm", though the word "TAPE" was not known to him until later. (T. 393, App. 507) He did not become aware that AMPI had made illegal corporate contributions until years later when investigators disclosed AMPI's machinations, he testified. (T. 406, App. 520) In 1970, however, without this knowledge, references to "AMPI" or "AMPI contributions" were routinely made without distinguishing TAPE or referring specifically to the political fund. (T. 410-411A, App. 524-26) In addition to Senator Humphrey's and Mr. Chestnut's testimony on this point, Patrick O'Connor, treasurer of the Democratic National Committee in 1969-1970, confirmed that he, too, understood the phrase "AMPI funds" to include lawful payments from the political fund. (T. 443, App. 558) And Mr. Nova, a Government witness, said that (like Mr. Humphrey) he assumed the AMPI payments would come from a lawful political fund such as the AFL-CIO's COPE, whom he had billed for politicians on other occasions. (T. 83-87, 89, App. 201-207)

After speaking with Nelson and Lilly, Mr. Chestnut reported to Nova, (either by telephone or personally in Minnesota; Nova could not recall which), and asked him to prepare invoices. (T. 72, 84, App. 190, 202) (Nova said that Mr. Chestnut mentioned that money was in short supply that early

in the campaign; T. 72, App. 190; Mr. Chestnut did not recall this, T. 416, App. 531, and Harrison Dogole, a member of the 1970 Humphrey finance committee, testified that the campaign had been well financed and was not short of funds even early on. T. 446, App. 561) Nova had an invoice prepared and forwarded to AMPI; (T. 73, App. 191) the invoice, dated April 30, 1970, was for $12,000 for "consulting fee for Minnesota" and directed to AMPI c/o Lilly at New Ulm, Minnesota[8] Lilly received it in San Antonio, T. 116, App. 235, and shortly thereafter received a call from Mr. Chestnut telling him the invoice was incorrect and not to pay it, but to await a corrected copy. (T. 116, 130, App. 235, 248) This was then confirmed by a letter from Mr. Chestnut dated May 7, 1970, saying:[9]

> Thank you for your recent correspondence and enclosure. It is appreciated very much. The bill which I was going to forward to you did not arrive in proper form and I returned it for proper editing and will forward it as soon as it is received.

(Neither Lilly, Nova, or Mr. Chestnut knew how or why the second set of invoices was prepared. T. 78, 404, 417, App. 196, 518, 532) Lilly then received another letter from Mr. Chestnut,[10] dated, May 12 with four invoices, each for $3,000 dated April 17, April 24, May 1, and May 7, respectively.[11] Lilly sent a letter dated June 1,[12] to "Mr. Jack Chestnut, CHESTNUT,

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[8] Government Exhibit 1, Appendix. All exhibits are in a separate volume of the appendix.

[9] Government Exhibit 6. Appendix. Mrs. Broome typed this letter, and testified that she probably drafted it herself or upon general instructions from Mr. Chestnut or Mrs. Miller or Mr. Nova; in her judgment, Mr. Chestnut did not dictate the letter to her. (Tr. 377-378, App. 491-92)

[10] Government Exhibit 7, App.

[11] Government Exhibit 2, App.

[12] Government Exhibit 8, App.

JONES, BROOKS, KENNEDY & BURKHARD Attorneys at Law" in Minneapolis, enclosing a check for $6,000[13] for two of the statements and saying that an additional payment would be made in the near future. (T. 129, App. 247) On June 11, another check for $6,000[14] was sent, with a letter[15] addressed the same way indicating the check was to cover the May 1 and 8 invoices. (T. 129, App. 247) Both checks were drawn on the AMPI corporate account, not on the TAPE account. (T. 110, App. 229) The checks were ultimately deposited in L&N's account with Banker's Trust, in Manhattan, (T. 311, App. 426)[16]

Mr. Nova did not remember seeing the checks at his desk in Mr. Chestnut's office in Minneapolis. (T. 91, App. 209) Mr. Chestnut testified he was certain he never saw the checks. (T. 405, 417, App. 519, 532) There were no letters or other evidence of transmittal to L&N or of what happened to them between the time Lilly mailed them and the time they arrived in the bank, in particular no testimony that Mr. Chestnut ever saw, handled, transmitted, or approved the receipt of the checks.

The only evidence to fill this lacuna came from Mrs. Broome; while she did not remember seeing the checks, it was she who opened mail addressed to Mr. Chestnut, and she testified:

> Q. By the nature of the correspondence and enclosures, and based upon the office procedures you described, how would those items of mail have been handled?
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> . . .
>
> A. If I had received these letters with, I assume these are the enclosures and I was quite familiar with the firm

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[13] Government Exhibit 3, App.
[14] Government Exhibit 4, App.
[15] Government Exhibit 9, App.
[16] Government Exhibit 27, 28, App.

of Lennen & Newell, I would have simply forwarded them to them or given them to one of their representatives if they were in the office.

Q. Where these representatives of Lennen & Newell in the office?

A. Yes, there were two representatives, Barry Nova and Jerry Gross, who were frequently in the Humphrey office and I knew them and worked with them.

Q. It would be the type of item that you would not feel would be deserving of Mr. Chestnut's attention?

A. No, I would move it along. It was something I could handle myself and it wasn't addressed to us (i.e., the checks were made out to L&N], it would go to Lennen & Newell. (T. 362-363, App. 476-77)

Such was the extent of the evidence on the question of whether Mr. Chestnut saw the checks and, knowing they were drawn on corporate funds, caused L&N to accept them.

The defense introduced a letter dated in the midst of these events, June 16, 1970, from Mr. Chestnut to Lilly (written and signed in Mr. Chestnut's name by Mrs. Miller) returning a different corporate check and saying:

> The enclosed check was recived from Dave Parr. I note that it's drawn on a corporate account. As such I can't deposit it at this time. Perhaps you can have the parties remit on a personal basis.[17]

7. Evidence of Collateral Events

The Humphrey campaign received several other remittances through Lilly around the same time, which the Government offered as evidence of other "criminal conduct" allegedly to prove the element of willfulness.[18] Over defense objection the

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[17] Defense Exhibit C, App.

[18] Government's Memorandum of Law on the Admissibility of Evidence of Chestnut's Prior and Subsequent Criminal Conduct, Appendix 108.

evidence was received with a limiting instruction (T. 131-141, App. 249-59); a motion to strike the evidence when the Government rested was denied (T. 314-316, App. 429-31); an instruction requested by the defense upon the legality of these payments was refused and a specific objection to the refusal noted after the charge, (T. 568, App. 684), which included another limiting instruction (T. 556-557, App. 672-73); the issue was raised and rejected upon the motion for a new trial. (App. 787)

The evidence was that Lilly made the following payments: a $10,000 check dated May 4, 1975, on his personal account, to the Minnesota Democratic Campaign Committee[19] (T. 144-147, App. 262-65); another similar check for $1,450 (an amount requested by Mr. Chestnut), dated June 11, 1975[20] (T. 150-151, App. 268-69); and a final contribution of $12,500 cash given to Mr. Chestnut in October. (T. 154-155, App. 272-73) Mr. Chestnut recalled these contributions, and testified that they were altogether lawful in his understanding. (T. 398-400, 407, 409, 417, App. 512-14, 521-23, 532)

It was the Government's theory not that these contributions were unlawful because they consisted of corporate funds,[21] but that they violated 18 U.S.C. §608 by exceeding the $5,000 limitation on certain contributions. Lilly was allowed over objection to give a legal opinion to this effect. (T. 102, 153, App. 221, 271) Despite the testimony of Messrs. O'Connor, Chestnut and French (and the latter's letter of legal opinion on the point to Mr. Chestnut)[22] that the limitation did not apply to a state

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[19] Government Exhibit 10, App.

[20] Government Exhibit 11, App.

[21] As it transpired later, they were, since Lilly was reimbursed by AMPI as part of an elaborate unlawful "kick-back" scheme, but even the Government did not contend that Mr. Chestnut was aware of this, and the jury was instructed there was no evidence Mr. Chestnut was part of or had knowledge of the scheme. (T. 145, 148, 156, 557, App. 263, 266, 274, 673)

[22] Defense Exhibit E, App.

or local committee, and that the Minnesota Democratic Campaign Committee was precisely such a committee, the court refused to read §608 to the jury or instruct as requested by the defense.[23] (T. 340-343, 407, 441-442, 568, App. 454-57, 521, 556-57, 687)

In July or August, 1972, after Humphrey lost the Democratic nomination to Senator McGovern, Mr. Chestnut returned to his law office, found it "overflowing," and asked his attorney, Mr. French, if there were any reason why he should not dispose of campaign materials which had accumulated; Mr. French advised him there was not. (T. 267, 339-340, 346-349, 428, App. 381, 453-54, 460-63, 543) Therefore he, Mrs. Miller, Mrs. Broome, and others, over a period of time, threw out the campaign materials, putting them in the corridor outside the law office, except for personal documents including those referring to individual contributions, and obsolete law-firm records, which were incinerated to protect their privacy. (T. 230 et seq., 368, 373, App. 347 et seq., 482, 487) In her earlier testimony to the grand jury, Mrs. Miller had testified that when Mr. Chestnut discussed disposal of the records in 1972 he had said, in effect, that although he did not think they contained anything improper, "they" would not have access to them, and that the "they" referred to was presumably the "Watergate" committee. (T. 237-241, App. 354-58) At trial Mrs. Miller said this was incorrect, that she had been confused as to the time of the conversation and that it did not take place during the existence of the Watergate committee, but before its creation (T. 235-243, App. 352-60) The Government was allowed over objection to impeach Mrs. Miller by referring to her grand jury testimony, and to introduce a transcript of

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[23] Defense Requested Instruction 26, App. 727.

a selected portion of her grand jury testimony as an exhibit.[24] (T. 237 et seq., App. 354 et seq.) Over objection, too, the Government established that Mrs. Miller had invoked the Fifth Amendment privilege before the grand jury and been granted immunity. (T. 258, App. 372)

Mr. Chestnut had received a retainer of $5,000 to do legal work for AMPI in Minnesota in 1970; the fee was paid in eight monthly installments by William Connell, an AMPI consultant who recommended that AMPI hire Mr. Chestnut, Mr. Chestnut testified, and were handled in the normal course of the Chestnut lawfirm's records. (T. 421-428, 438-439, App. 536-43, 553-54) The prosecutor characterized the retainer as an "under the table" payment from AMPI; a motion for mistrial was denied as untimely. (T. 423, App. 538)

Finally, a handwriting expert testified that the signatures on the letters to Lilly were written by Mr. Chestnut, which he never disputed, (T. 287-288, App. 401-02), and that handwriting exemplars provided by Mr. Chestnut later were markedly different from other examples of his signature, (T. 287 et seq., 303, App. 401 et seq., 418), but conceded that other signatures made under different circumstances differed greatly as well. (T. 306-307, App. 421-22)

8. Motions and Instructions

Motions for judgment of acquittal for failure to prove willfulness, venue, and a "contribution" (as opposed to an expenditure) were denied at the close of the Government's case, at the close of all the evidence, and after verdict. (T. 316 et seq., 475 et seq., App. 431 et seq., 590 et seq., 787)

The defense requested the court to instruct the jury upon the definitions of "contribution" and "expenditure" in §591,

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[24] Government Exhibit 16, App. . The jury requested and received this exhibit during deliberations. (T. 570 et seq. App. 687 et seq.)

that proof of the former was an essential element, and that if the AMPI payments were "expenditures" it was no crime to receive them under §610.[25] This was denied; no such instruction was given, the defense re-stated the objection after the charge, (T. 569, App. 685), and objected to the instruction given that the payment of another's bill is a gift and a contribution. (T. 569, App. 685) Both before and after instructions the defense objected to an instruction that the defendant had a strong motive for testifying falsely, (T. 569, App. 685), and objected to the refusal to instruct on §608 limits on contributions to state or local committees. (T. 568, App. 684) [26]

ARGUMENT

Introduction

This was an idiosyncratic prosecution in many respects, in its origins, its progress and its harsh result. The accusation evolved from the investigation of Nixon administration wrongdoing in 1968, which incidentally uncovered AMPI's Machiavellian enterprises and inspired an investigation of AMPI itself, and of political figures, including Senator Humphrey, who were the unfortunate beneficiary-victims of AMPI's devious largesse.[27] Lilly's revelations resulted in the peculiar indictment in which Mr. Chestnut became one of the few persons ever charged with receiving (as opposed to making) a corporate contribution under a statute which has forbade such

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[25] Defense Requested Instruction 22, App. 723.

[26] Defense Requested Instruction 26, App. 727.

[27] See letter of Special Prosecutor Ruth, App. 5; *Final Report*, United States Senate Select Committee on Presidential Campaign Activities, 930 Cong. 1st Session, Committee Print, November 1974, 579 et seq.

conduct since 1925.[28] The indictment is curiously awkward in charging Mr. Chestnut with causing L&N to receive, rather than a more straightforward charge of aiding AMPI in making the payment; we may only speculate this was done in an attempt to obtain venue in New York, no other rationale being apparent.

The language of the statutes in effect in 1970 is crucial to several issues: the constitutionality of the statutes, the ex post facto indictment, the failure of the indictment to charge an offense, the court's refusal to instruct the jury upon the difference between contribution and expenditure, and the failure to prove a contribution as opposed to an expenditure. Because of the common considerations, these points will be argued seriatim.

Because, however, we believe that the evidence was simply insufficient to prove two other essential elements—intent (or knowledge of willfulness) and venue—we argue these points first, since a resolution upon either of them in Mr. Chestnut's favor would make it unnecessary for the Court to consider the other questions.

I. THE EVIDENCE FAILS TO APPROACH PROOF BEYOND A REASONABLE DOUBT THAT MR. CHESTNUT EVER SAW THE CHECKS IN QUESTION OR KNEW THEY WERE DRAWN ON CORPORATE FUNDS, AND THUS FAILS TO SHOW WILLFULNESS, BUT WAS AS CONSISTENT WITH INNOCENCE AS GUILT.

One of the most important features of the transaction which underlies this conviction is not readily apparent and deserves

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[28] There appear to be *no* reported decisions involving charges of receiving and only a relative handful concerning the making of illegal contributions, despite the statute's longevity. See the recent Anno., "Constitutionality, Construction and Application of 18 U.S.C. §610, Prohibiting National Banks, Corporations, and Labor Organizations From Making Contributions or Expenditures in Connection With Federal Elections," 24 A.L.R. Fed. 162 (1975).

emphasis. It is this: Mr. Chestnut had absolutely no motive for accepting AMPI corporate funds. On the contrary, he knew and instructed his staff that corporate contributions were unlawful; he knew that AMPI had ample lawful political funds available; he had every reason to believe these funds would be the source of the AMPI payments. It is the cruel irony of this case that if the checks in question had been drawn from one checkbook (TAPE) rather than another (AMPI) no violation by anyone would have occurred.[29] The benefit of the money to the Humphrey campaign would have been identical, with no attendant disadvantages or illegality.

Nelson and Lilly, however, had not only a motive for using non-TAPE funds (to conceal the contribution from the Republican administration), but an additional and equally powerful motive for concealing this policy from Humphrey and Chestnut (because AMPI surely wished to remain in Senator Humphrey's good graces, the very purpose of the payment, which it would not if he knew of the duplicity which led AMPI to jeopardize his campaign with tainted money for AMPI's purely self-serving purposes). There was no evidence that if Mr. Chestnut had seen or known of the corporate checks he would not simply have returned them to Lilly and requested payments from the political fund instead. He had no reason not to do so, nor to believe that a proper payment would not be forthcoming. This was the procedure followed contemporaneously in at least one case, evidenced in Defense Exhibit C, a letter from Mr. Chestnut (written and signed by Mrs. Miller), on June 16, 1970, returning a check to Lilly and saying:

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[29] For a discussion of the nature and legality of such political funds see *Pipefitters Local Union v. United States*, 407 U.S. 385 (1972); and see *United States v. Boyle*, 482 F.2d 755 (CADC 1973), cert den. 414 U.S. 1076; *Barber v. Gibbons*, 367 F.Supp. 1102 (D.C.Mo. 1973); Cohan, "Of Politics, Pipefitters and §610: Union Political Contributions in Modern Context," 51 Texas L.Rev. 936.

> The enclosed check was received from Dave Parr. I note that it's drawn on a corporate account. As such I can't deposit it at this time. Perhaps you can have the parties remit on a personal basis.

Motive, then, was altogether lacking, and while motive is not an essential element of proof its absence is important in evaluating the sufficiency of such evidence as there was.[30] And what was the evidence of Mr. Chestnut's knowledge, intent and willfulness?

The transaction originated not with Mr. Chestnut, but with Nelson, who volunteered that "AMPI" would pay some L&N bills; Mr. Chestnut (believing that "AMPI" would do this lawfully) agreed and communicated this to Nova, who had invoices prepared; Mr. Chestnut, or someone in his office, received the invoices, and forwarded them to Lilly, who obtained the checks and sent them to Mr. Chestnut at his lawfirm. At this crucial point the Government's evidence stops, until the checks appear in L&N's bank. What probably occurred in that crucial hiatus is that Mrs. Broome or Mrs. Miller opened the Lilly letters, found the checks made out to L&N and simply passed them on to Nova personally or mailed them to L&N, as Mrs. Broome testified she would have. This is not only a

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[30] Upon appeal, of course, the evidence is viewed in the light most favorable to the Government, e.g., *United States v. Freeman*, 498 F.2d 569 (2nd Cir. 1974). The term "willful" is variously defined depending upon the circumstances and statute in question. See, e.g., *United States v. Crimmins*, 123 F.2d 271 (2nd Cir. 1941); *Hanly v. SEC*, 415 F.2d 589 (2nd Cir. 1909); *Spies v. United States*, 317 U.S. 492 (1942); and *Brown v. Bullock*, 294 F.2d 415, 420 (2nd Cir. 1961) indicating that in criminal statutes "willfully" generally means an act done with a bad purpose.

Under §610 a violation is a misdemeanor unless willful, in which case it is a felony, of which Mr. Chestnut was convicted. Although §610 is silent as to the difference in proof required, the distinction between willful and non-willful itself obviously contemplates a good deal more to prove the latter, and the "bad purpose" element is thus necessary.

reasonable theory of innocence, but the most probable and reasonable explanation of the events.

And it illustrates the indispensible functions of the presumption of innocence and proof beyond a reasonable doubt. For there was no way for Mr. Chestnut to prove what happened, even if the burden had been upon him to do so. He could not recall the details of his dealings with Nelson and Lilly and Nova, understandably since the events were four years in the past, relatively unnotable events in the midst of a hectic campaign which coincided with a busy law practice; and even had the campaign been recent, Mr. Chestnut could not supply what he did not know. One cannot prove a negative.

Thus the law wisely requires proof beyond a reasonable doubt. It is not too much to ask here—a witness who saw the checks in Mr. Chestnut's hands, or who heard him refer to them; evidence that he was even in his office when the checks supposedly passed through there; any bid of evidence tending to show the crucial awareness. But it is not there. It is not a question of weighing the credibility of conflicting witnesses, for there was no conflict in the testimony; there was no testimony of what happened to the checks.

There is not enough to justify a reasonable mind in concluding guilt beyond a reasonable doubt.[31] The utter lack of evidence of Mr. Chestnut's awareness of the checks, together with the uncontradicted evidence that they would normally have been transmitted to L& Nwithout being brought to his attention establishes a reasonable doubt here if anywhere.

The other collateral evidence from which the Government would invoke an inference of willfulness does not fill the lacuna. The two Lilly checks and the payment of cash, for example, militate the other way. These payments carried no in-

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[31] See *United States v. Taylor*, 464 F.2d 240 (2nd Cir. 1972).

dicia of corporate origin and thus to the extent they show Mr. Chestnut's understanding of AMPI contributions they tend to prove he would have expected the L&N payments to be in the same, non-corporate form; by this evidence the Government proves too much, or the wrong thing. The disposal of the campaign records (not shown to contain any evidence of unlawful corporate payments in any event) was shown to have been done for perfectly good and honorable reasons, and after Mr. Chestnut conscientiously obtained specific legal advice. The remark which Mrs. Miller had earlier attributed to Mr. Chestnut is at best a remote inspiration of conjecture; he could not have referred to the so-called "Watergate" committee at that time in 1972 (two and one half years after the events in question), because the committee was not even in existence. The retainer from AMPI has no probative value at all on the point; it, too, acquires a sinister aura only as illuminated by the prosecutor's innuendo.

These items were calculated merely to cast an atmosphere of suspicion around and divert attention from the conspicuous blank space at the very heart of the Government's evidence: the absence of any evidence Mr. Chestnut saw or knew of the checks; the absence of any reason for AMPI to make him aware of the illegality; and the telling absence of any reason for Mr. Chestnut to participate in that illegality.

AMPI's recently disclosed deviousness must not be allowed to visit tragedy and condemnation of this sort upon a man of Mr. Chestnut's demonstrated character,[32] integrity and accomplishment simply because he was unfortunate enough to have dealt with the organization at a time when it appeared

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[32] Evidence of good character alone may in some circumstances be enough to raise a reasonable doubt of guilt. *Michaelson v. United States*, 335 U.S. 469 (1949).

benign but was not, at a time when Mr. Chestnut was newly in the position of campaign manager for a major candidate, and was if anything perhaps insufficiently cynical and suspicious (by standards which have evolved from later revelations) in his approach to contributors; the law must not allow this to happen without the high degree of evidence which the statute and the Constitution require.

As the Supreme Court has recently said, after reaffirming the indispensible role of the burden of proof beyond a reasonable doubt in criminal cases:

> Moreover, use of the reasonable-doubt standard is indispensible to command the respect and confidence of the community in applications of the criminal law. It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned. It is also important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty. *In re Winship*, 397 U.S. 358, 364 (1970).

The conviction should be reversed for failure to prove knowledge, intent and willfulness, with directions to enter a judgment of acquittal.

II. THE GOVERNMENT FAILED TO PROVE VENUE IN NEW YORK, SINCE EVERY ELEMENT OF THE TRANSACTION OCCURRED ELSEWHERE EXCEPT ACTUAL DEPOSIT OF THE CHECKS.

In his opinion denying the motion for a judgment of acquittal, Judge Weinfeld succinctly framed this issue:

> There is no dispute that the AMPI checks were deposited by Lennen & Newell in its bank account in Man-

> hattan and that, so far as the evidence indicates, the defendant was not then present in this district. The evidence does indicate that defendant's various acts in arranging for Lennen & Newell to bill AMPI for the advertising services and AMPI's payment with its corporate checks occurred in Minnesota. There is no proof of where the checks were physically delivered to Lennen & Newell, Inc. prior to their deposit in this district. Under these circumstances, was venue proper in this district? (App. 795)

The answer dictated by this Court's decisions is in the negative, since the offense (if any) was the causing by Mr. Chestnut and not the receiving by L&N. And even if the receiving had been the offense, the agreement was consummated in Minnesota, and the evidence is at best ambiguous as to where physical receipt of the checks by L&N occurred.

The indictment as submitted to the jury charged that Mr. Chestnut, "in the Southern District of New York and elsewhere", caused L&N to receive the contribution, in that he arranged for the payment and caused the invoices and checks to be forwarded; and the bill of particulars asserted that he "telephonically contacted a representative of Lennen & Newell . . . in New York." It thus appears the Government intended and expected to prove these nexes to New York, but failed to do so.

A conviction for endeavoring to persuade a witness (Gold) to give false testimony was reversed and acquittal ordered in *United States v. Brothman*, 191 F.2d 70 (2nd Cir. 1951). Although Gold's testimony was given in the Southern District, Brothman's endeavors took place in the Eastern District. Judge Swan held it was proper to move for judgment of acquittal on this ground, citing *United States v. Jones*, 174 F.2d

746 (7th Cir. 1949), where Judge (later Mr. Justice) Minton had said at page 748, referring to venue:

> It is hardly worthwhile to point out that the proper motion to raise the question as to the sufficiency of the evidence is a motion for acquittal. . . .
>
> The Government has a duty to perform. First, it must prove its case on the record and that includes proof of venue. 174 F.2d at 748.

In *United States v. Mancino*, 179 F.Supp. 897 (S.D.N.Y. 1960), a judgment of acquittal was ordered for failure to prove venue in a narcotics possession and conspiracy case because the defendant's conduct was confined to Brooklyn, and in *United States v. Provoo*, 215 F.2d 531, 539 (2nd Cir. 1954) a conviction was reversed for failure of venue and this leading statement from *United States v. Johnson*, 323 U.S. 273 (1944) was adopted:

> Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed.

In *Johnson* Mr. Justice Frankfurter reviewed the Constitutional foundations of the venue requirement and referred to the so-called doctrine of the continuing offense:

> Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution.
>
> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on

> which it ultimately rests. . . . If an enactment of Congress equally permits the underlying spirit of the Constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it. 323 U.S. at 275-276.

See also *United States v. Anderson*, 328 U.S. 699 (1945), and, more recently, after enactment of 18 U.S.C. 3237 providing for trial in more than one district in certain circumstances, *United States v. Cores*, 356 U.S. 405 (1958), where the Court noted that in the absence of a specific statutory provision the determination of venue must be based upon

> the nature of the crime alleged and the location of the act or acts constituting it. 356 U.S. at 408.

And see *Travis v. United States*, 364 U.S. 631 (1961).

An indictment was dismissed in *United States v. Flaxman*, 304 F.Supp. 1303 (S.D.N.Y. 1969), because the defendant, charged with aiding in falsifying a form, "completed his active role" in the Eastern District, although the form was filed in the Southern District. See *United States v. Slutsky*, 487 F.2d 832 (2nd Cir. 1973), where the Court adopted the "statutory key verbs" test for determining venue as set forth in *United States v. Hagan*, 306 F.Supp. 620, 621-622 (D.Md. 1969):

> 'All federal crimes are statutory, and these crimes are often defined, hidden away amid pompous verbosity, in terms of a single verb. That essential verb usually contains the key to the solution of question: In what district was the crime committed? Without the exact language of the statute, particularly this verb, paraphrases and loose citations in this field are more than inaccurate; they are positively misleading. When, as is so often the case,

> the statute enumerates several such verbs, only scrupulous, even meticulous, nicety in exact quotation can prevent these statutes, as well as the decisions under them, from proving a snare and a delusion to the unwary.'

A bribery conviction was reversed in *Krogmann v. United States*, 225 F.2d 220 (6th Cir. 1955), because the cynosure of the offense was found to be the giving of the money in a different district, and the offense was not a continuing one under 18 U.S.C. §3237.

And in *United States v. Bozza*, 365 F.2d 206, 220-221 (2nd Cir. 1966), convictions for receiving stolen stamps and aiding and abetting were reversed for failure to prove venue; Judge Friendly found the offense not to be a continuing one and wrote:

> To such extent as the issue is doubtful, it is best to resolve the doubt in favor of a construction which will ensure trial where witnesses to the receiving are more likely to be present; otherwise the mere happenstance of a telephone call from a district, possibly remote, where a defendant chanced to be, could deprive him of the protection of the Sixth Amendment.

In the same vein, Judge Mulligan wrote in *United States v. Candella*, 487 F.2d 1223, 1227 (2nd Cir. 1973):

> While the question of whether the trial is conducted almost literally at one end of the Brooklyn Bridge or the other might seem to be a quibble, questions of venue in criminal cases are of constitutional concern. . . . Venue must be laid where the crime was committed, and that place is to be "determined from the nature of the crime alleged and the location of the act or acts constituting it."

And see *United States v. Taller*, 394 F.2d 435 (2nd Cir. 1968).

The present case is unusual in that neither aiding and abetting nor conspiracy was charged, but rather *causing*, and no principal was charged; (and apparently none needed to be; see *United States v. Chiarella*, 184 F.2d 903, 909 (2nd Cir. 1950); indeed otherwise the indictment itself would be invalid for failure to charge another with a substantive crime. See *United States v. Campbell*, 426 F.2d 547 (2nd Cir. 1970).) Thus it is all the more essential to focus upon Mr. Chestnut's conduct and the nature of the alleged offense to determine the venue, since no guilty principal's act supplies it.

The trial court's focus on deposit of the checks was misplaced. Mr. Nova was a senior vice president, capable of contracting for and accepting the checks on behalf of L&N. Under §591 a contribution "includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable". Agreement that AMPI would pay and L&N would receive payment for the bills was made outside New York and the offense (if any) was complete long before the checks reached New York. Thus the trial court's speculation that the checks might have been returned or destroyed is irrelevant because the deposit was not "the final element of the crime".

And so the trial court's reliance upon *Burton v. United States*, 196 U.S. 283 (1905), with its focus upon deposit of checks was misplaced. More apposite is a subsequent decision involving the same defendant: *Burton v. United States*, 202 U.S. 344, 381-389 (1906). Burton, a Senator, agreed to represent a company in a matter in which the United States had an interest, contrary to a statute forbidding Senators to "receive or agree to receive" compensation for such services. The agreement was effected by mail, the company being in St.

Louis, Burton elsewhere. The Court held: "The agreement between the parties was completed at the time of the acceptance of the defendant's offer at St. Louis . . . then the offense was committed, and it was committed at St. Louis. . . ." 202 U.S. at 388.

Finally, if the payment were a "gift" as the trial judge reasoned, 394 F.Supp. at 586, it could have been a "gift" only to the Humphrey campaign and not to L&N, to whom it was merely payment for services rendered; by no stretch of imagination or statutory language can it be said that L&N received a "gift" from either AMPI or the Humphrey campaign when the checks were deposited in New York. The trial judge's finding that the payment was a gift is irreconcilable with his ruling that the offense was committed in New York.

The evidence is uncontradicted that if Mr. Chestnut and Lilly and Nova made an agreement, they did so in Minnesota; if Mr. Chestnut received the checks, if he caused L&N to accept them, if he mailed the checksor handed them to an L&N employee, it was in Minnesota and, at the very latest the offense was complete at that point. The offense is manifestly not a continuing one. The provisions of §610, after all, are designed to prevent influence upon a political candidate; here neither the candidate nor AMPI and Lilly were in New York; Nova and Gross were in Minnesota; only L&N's bank account even brought mention of New York into the trial.

Therefore whether the offense is viewed as the agreement, the causation, or the receipt of the checks the evidence failed to establish that it occurred in New York, and if the Constitutional venue requirements retain any vitality this conviction must be reversed with an order to enter a judgment of acquittal.

III. ON THEIR FACES AND AS APPLIED HERE 18 USC §591 AND §610 WERE UNCONSTITUTIONALLY VAGUE, DID NOT CONTAIN A FIXED STANDARD OF GUILT, BUT REQUIRED PERSONS OF COMMON INTELLIGENCE TO GUESS AT THEIR MEANING AND DIFFER AS TO THEIR APPLICATION.

The most effective way to demonstrate the fatal vagueness in these statutes is to set them forth, and to ask: What is a "contribution" as opposed to an "expenditure"? And under which term falls the payment of a campaign's bills by a third party? The distinction is crucial, because it is no offense to *receive* an "expenditure".

The operative language of 610 provides:

> It is unlawful . . . for any corporation whatever . . . to make a *contribution or expenditure* in connection with any [federal] election . . . or for any . . . person to accept or receive any *contribution* . . . .

Section 591 in its applicable form read:

> When used in [section 610]—
>
> The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;
>
> The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable;

Can a potential *receiver*, of common intelligence, be expected to determine from this language that payment of a campaign bill by a third party is a "gift, subscription, loan, advance, or deposit" within the definition of contribution, and

not a "payment" or "distribution" within the definition of expenditure? Or would reasonable men be required to guess and expected to differ on the question?

Since all the reported decisions involve prosecutions of donors, and it is a crime to *make* either a contribution or expenditure, no court has analyzed the distinction where a donee is charged.

A penal law is unconstitutional if men of ordinary intelligence must guess at its meaning and differ as to its application; it must contain an ascertainable standard of guilt, expressed with sufficient clarity to inform those subject to it what conduct is forbidden, and set forth with enough precision to guide both citizens and courts.[33]

When penal legislation affects First Amendment rights the threshold of Constitutionality is even more demanding; "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963); *Schenck v. United States*, 249 U.S. 47 (1919); *Dennis v. United States*, 341 U.S. 494, at 510 (1950).

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[33] See cases collected in Anno., Indefiniteness of Language as Affecting Validity of Criminal Legislation—Supreme Court Cases, 96 L.Ed. 374; and Anno., Indefiniteness of Language as Affecting Validity of Criminal Legislation or Judicial Definition of Common Law Crime—Supreme Court Cases, 16 L.Ed.2d 1231; and in particular *Connolly v. General Constr. Co.*, 269 U.S. 385 (1926); *Bouie v. Columbia*, 378 U.S. 347 (1964); *Winters v. New York*, 333 U.S. 507 (1948); *Williams v. United States*, 341 U.S. 97 (1951); and as to §610 itself, see the annotations in 69 A.L.R. 377, 125 A.L.R. 1029, 167 A.L.R. 1465, 1 L.Ed.2d 1918 and 24 A.L.R. Fed. 162, which collects cases to date specifically discussing the Constitutionality of 18 U.S.C. §610. Among the commentators, these are notable: Donald B. King, "Corporate Political Spending and The First Amendment", 23 *University of Pittsburgh Law Review*, 847-879 (1962); Comment, "Constitutionality of Section 610 of the Federal Corrupt Practices Act", 46 *California Law Review*, 439-446 (1958); Comment, "Section 304, Taft-Hartley Act: Validity of Restrictions on Union Political Activity", 57 *Yale Law Journal*, 806-827 (1948).

In 1948, a predecessor of §610, containing language identical to that challenged here was held to violate the First Amendment in *United States v. C.I.O.*, 77 F.Supp. 355 (D.C. D.C. 1948). The Supreme Court affirmed in *United States v. C.I.O.*, 335 U.S. 106 (1948), but on other grounds, declining to pass upon the Constitutional question. Significantly, however, five Justices discussed the Constitutional defects of the statute, four outright declaring its unconstitutionality:

> The crucial words are "expenditure" and "in connection with". Literally they cover any expenditure whatever relating at any rate to a pending election, and possibly to prospective elections or elections already held. The broad dictionary meaning of the word "expenditure" takes added color from its context with "contribution". The legislative history is clear that it was added by the 1947 amendment expressly to cover situations not previously included within the accepted legislative interpretation of "contribution". (Footnote omitted.) The coloration added is therefore not restrictive; it is expansive.
>
> . . .
>
> A statute which, in the claimed interest of free and honest elections, curtails the very freedom that make possible exercise of the franchise by an informed and thinking electorate, and does this by indiscriminate blanketing of every expenditure made in connection with an election, serving as a prior restraint upon expression not in fact forbidden as well as upon what is, cannot be squared with the First Amendment. 335 U.S. at 133, 155.

But for the exercise of judicial restraint by the majority of five Justices it seems clear the statute would have perished as early as 1948: even the majority acknowledged that if the Defendant's conduct *were* covered by the statute "the gravest

doubt would arise in our minds as to its constitutionality". 335 U.S. at 121.

The issue arose again in *United States v. I.U.U.A.*, 352 U.S. 567 (1957), or the *Auto. Workers* case as it is more often called, but the majority again avoided the Constitutional decision; three justices dissented and would have held §610 unconstitutional.

In *Pipefitters v. United States*, 407 U.S. 385 (1972), the Court added a further gloss upon the scope of §610 as applied to expenditures by unions, but avoided the ultimate constitutional questions. See *United States v. First Nat. Bank*, 329 F. Supp. 1251 (D.C. Ohio, 1971), and compare *United States v. Boyle*, 482 F.2d 755, 763-764 (C.A.D.C. 1973), where an attack on the constitutionality of §610 was rejected, but the Supreme Court denied certiorari. 414 U.S. 1076.

This Court addressed, but also avoided decision of the question in *United States v. Painters Local Union*, 172 F.2d 854 (2nd Cir. 1949), reversing a District Court decision which had held the statute valid, and noting:

> We should bear in mind the further important consideration that all of the Justices of the Supreme Court who participated in the CIO decision regarded the prohibition of the statute if applied to the facts of that case either as involving an undue abridgement of the rights of free speech, free press, and free assembly, or at best as of exceedingly doubtful constitutionality. 172 F.2d at 856.

Since those decisions the Supreme Court has handed down *Dombrowski v. Pfister*, 380 U.S. 479 (1965), *Gooding v. Wilson*, 405 U.S. 518 (1972), and *Coates v. Cincinnati*, 402 U.S. 611 (1971), striking down legislation as unconstitutionally

vague even though the defendants' conduct was not protected. In *Coates* the Court said:

> Although a statute may be neither vague, overbroad, nor otherwise invalid, as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights. 402 U.S. at 619-620.

The versions of §§610 and 591 in question here enjoyed very precarious Constitutional health and would surely have expired under application of the *Coates* principle. Whether the very stringent criteria for statutes affecting speech are invoked, however, or the Constitutional desiderata of all penal legislation, it cannot be said that the provisions under which Mr. Chestnut was convicted have the required certainty. They could survive only if given a narrowing construction which grants the accused the benefit of doubtful meanings and resolves ambiguity strictly in his favor, *Rewis v. United States*, 401 U.S. 808, 812 (1971); if that is done here the payment must be seen as an expenditure, in which case the indictment did not state an offense, nor the evidence prove one, as we shall argue below.

The conviction should be reversed on the grounds that the applicable language of §610 and §591 was unconstitutionally vague and overbroad.

IV. THE INDICTMENT FAILED TO STATE AND THE EVIDENCE TO PROVE AN OFFENSE, BECAUSE THE PAYMENT DESCRIBED WAS AN "EXPENDITURE UNDER THE APPLICABLE LAW PROPERLY CONSTRUED AND IT WAS NOT UNLAWFUL TO RECEIVE AN "EXPENDITURE".

As we have seen, §610 does not prohibit the *receiving* of "expenditures":

> It is unlawful for any . . . corporation . . . to make a contribution or expenditure . . . or for any . . . person to accept or receive a contribution. . . .

Under §591 a "payment" or agreement to make or receive a "payment" is an expenditure and not a contribution:

> The term "contribution" includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement to make a contribution, whether or not legally enforceable;
>
> The term "expenditure" includes a payment, distribution, loan, advance, deposit, or gift, of money, or anything of value, and includes a contract, promise, or agreement to make an expenditure, whether or not legally enforceable;

The first law restricting political contributions was the Tillman Act of 1907, followed by the Corrupt Practices Act of 1925, which prohibited the giving and receiving of corporate contributions, defining the word as set forth above. The Taft-Hartley Act of 1947 added a prohibition on the making (but not the receiving) of expenditures, with the above definition of that word.

The Taft-Hartley Act, under which Mr. Chestnut was convicted, received the prompt attention of the Supreme Court, in *United States v. C.I.O.*, 335 U.S. 106 (1948), involving a union publication alleged to be an unlawful "expenditure".

The Court summarized as follows the legislative intention for adding "expenditure" to "contribution" in the Act:

> When Congress began to consider the Labor Management Relations Act of 1947 it had as a guide the 1944 presidential election, an election which had been conducted under the above amendment to the Act of 1925. In analyzing the experience of that election, a serious defect was found in the wording of the Act of 1925. The difficulty was that the word "contribution" was read narrowly by various special congressional committees investigating the 1944 and 1946 campaigns. *The concept of "contribution" was thought to be confined to direct gifts or direct payments.* Since it was obvious that the statute as construed *could easily be circumvented through indirect contributions,* §304 extended the prohibition of §313 to "expenditures". 335 U.S. at 115 (emphasis supplied).

The legislative history reviewed in *C.I.O.* demonstrates Congress's uncertainty as to the scope of the Act and its application,[34] but the *C.I.O.* decision settled the fact that "expenditures" are *indirect payments* which were not included in the definition of "contributions".

This is reaffirmed in *United States v. Auto. Workers,* 352 U.S. 567 (1957), where the union was charged with paying for television broadcasts favoring certain candidates. The District Court had dismissed the indictment, saying the payments were not within the statute, but the Supreme Court reversed. Noting the findings of the Senate's Special Committee on Campaign Expenditures, whose investigation of the 1944 elections led to the Taft-Hartley Act, the Court observed:

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[34] See, e.g., 93 Cong. Rec. 6436 et seq., and the Appendix to the concurring opinion, 335 U.S. at 156. Justice Rutledge tellingly described the legislative history as "a veritable fog of contradictions relating to specific possible applications, contradictions necessarily bred among both proponents and opponents of the amendment from the breadth and indefiniteness of the literal scope of the language used". 335 U.S. at 134.

The Committee found "no clear-cut violation of the Corrupt Practices Act on the part of the Political Action Committee" on the ground that it had made direct contributions only to candidates and political committees involved in state and local elections and federal primaries, to which the Act did not apply, and had limited its participation in federal elections to political "expenditures," as distinguished from "contributions" to candidates or committees. S.Rep.No.101, 79th Cong., 1st Sess. 23. 352 U.S. at 580.

. . . .

As indicated by the reports of the Congressional Committees that investigated campaign expenditures, *it was to embrace precisely the kind of indirect contribution alleged in the indictment that Congress amended §313 to proscribe* "expenditures". . . . 352 U.S. at 585 (emphasis supplied).

A payment of the same sort by a corporation was held an "expenditure" in *United States v. Lewis Food Company*, 366 F.2d 710 (9th Cir. 1966). Compare *United States v. Anchorage Cent. Labor Council*, 193 F.Supp. 504 (D.C.Alaska 1961) finding union broadcasts not within the statutes. And in *United States v. Painters Local Union No. 481*, 172 F.2d 854 (2nd Cir. 1949), This Court *sua sponte* found a union's payment for broadcasts not within the statute (and thereby sidestepped the Constitutional issues, which it acknowledged were very real). Compare the opinions in *United States v. Silverman*, 430 F.2d 106 (2nd Cir. 1970), involving payment by a union of stationery bills incurred by Mayor Beame's campaign, which Judges Friendly and Hays found not to violate 29 USC §501(c) (conversion of union funds to the use of another). Section 610 was not involved, of course, and the majority and dissents each refer to the payments rather indiscriminately

as both "contributions" or "expenditures". 430 F.2d at 112-117, and 126-128.

The cases, therefore, involving indirect payments similar to the AMPI payments describe them as "expenditures", and that is the only fair construction, the Constitutionally required construction here.

For even if doubt remains, any ambiguity in penal legislation must be resolved in favor of the accused, *Rewis v. United States*, 401 U.S. 808, 812 (1971).

As Chief Justice Marshall said in *United States v. Wiltberger*, 5 Wheat. 76, 96 (1820):

> To determine that a case is within the intention of a statute, its language must authorise us to say so. It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.

This Court has repeatedly recognized and applied this principle. In *United States v. Posnjak*, 457 F.2d 1110, 1118 (2nd Cir. 1972), the Court invoked the "well-established principle that criminal statutes are to be narrowly rather than expansively construed," and noted that:

> Judicial "revision" or "expansion" of criminal statutes may lead to problems of vagueness under the due process clause, for the statute on its face may not adquately warn individuals of what it proscribed. 457 F.2d at 1118, note 9.

Similarly in *United States v. Canton*, 470 F.2d 861 (2nd Cir. 1972) a conviction for interstate transportation of forged securities was reversed with directions to dismiss, the Court observing:

> If there were any doubt or any conflict in intrepretation of the statutes, it must be resolved in favor of the appellant. 470 F.2d at 865.

And see *Schwartz v. Romnes*, 495 F.2d 844 (2nd Cir. 1974), reversing a stockholder's summary judgment against the telephone company for alleged political expenditures by narrowly construing the New York law they were alleged to violate:

> In adopting a narrow interpretation of §460 we are but following the example set by the Supreme Court in its encounters with the Corrupt Practices Act, the federal analog of §460. Concerned with the serious constitutional doubts that would afflict a broad interpretation of the federal statute's prohibition of contributions or expenditures in support of a political candidate, the court has consciously opted for a restrictive reading of the statute's words. 495 F.2d at 852.

The indictment and evidence describe an expenditure on the face of the law, we believe, but even if that is doubtful the accused was entitled to the benefit of strict construction, a benefit repeatedly sought and denied him throughout these proceedings. His request for an instruction[35] that the jury must not convict unless they find that "the government has proved beyond a reasonable doubt that the payment made by AMPI to Lennen & Newell was a 'contribution' as opposed to an 'expenditure'" was rejected; it was renewed and the failure to give it excepted to after the charge. (T. 569, App. 685) Instead the Court charged that

> Paying another's bill when not under a legal obligation to do so is a gift of money or something of value. Thus, if you should find beyond a reasonable doubt that AMPI was a corporation and made a payment from its corporate funds to Lennen & Newell for services rendered by the latter to the Humphrey campaign for which AMPI had no legal obligation, then you have sufficient upon which

[35] Defense Requested Instruction 22, App. 723.

to find that the payment so made was a contribution to the Humphrey candidacy. (T., 547-548, App. 663-664)

Mr. Chestnut was therefore denied due process from the moment of accusation through and beyond the verdict, the jury was virtually directed to find an essential element.

The conviction should be reversed with direction to enter judgment of acquittal or to dismiss the indictment.

V. THE LANGUAGE AND CIRCUMSTANCES OF THE INDICTMENT SHOW THAT IT WAS RETURNED UNDER A 1972 STATUTE WHICH CHANGED THE APPLICABLE DEFINITIONS; THE PROSECUTION IS THEREFORE EX POST FACTO.

The significant differences between the definitions of contribution and expenditure were removed in 1972 when a new paragraph was added to §610, reading in part:

> As used in this section, the phrase "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value.[36]

Here for the first time the two words were given the same definition.[37] For the first time a "payment" was included in the definition of contribution. And for the first time, "indirect" payments and "services" were alluded to.

As the trial judge observed, the language of the indictment determines the statute it invokes, 394 F.Supp. at 584-585, but contrary to his finding, the language of this indictment is clearly drawn from the 1972 amendment. The indictment alleges that (in 1970) Mr. Chestnut arranged that "AMPI would make *payment* for one month's *services* rendered to the

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[36] Pub.L. 92-225, Title II, §205, 86 Stat. 10, see Addendum.

[37] Ironically, however, at the same time §591, purporting to continue to apply to §610, redefined the two terms also, but differently from §610, and preserved the distinction between contribution and expenditure. Pub.L. 92-225, Title II, §201, 86 Stat. 8, see Addendum.

Humphrey campaign by Lennen & Newell". Only under the 1972 amendment are the words "payment" and "services" used in relation to "contributions". An indictment properly drawn under §591 would certainly have referred to the "contribution" by one of the applicable terms: "gift, subscription, loan, advance, or deposit," because receipt of a "payment" did not state an offense at that time. Therefore, solely from a reading of the indictment, it is apparent the indictment refers *ex post facto* to the 1972 statute. But beyond this there is ample and persuasive circumstantial confirmation that this was the case.

First, the indictment (in 1974) cites the statute as merely 18 U.S.C. §610, with no allusion to the official Statutes at Large or indication that any version other than the one in force at the time of indictment was contemplated; there is no reference to §591. Rule 7(c), Federal Rules of Criminal Procedure, requires that:

> The indictment . . . shall state . . . the official or customary citation of the statute . . . which the defendant is alleged to have violated.

The official or customary citation here would have been to "18 U.S.C. §591 and §610 (1970), *as amended,* 18 U.S.C. §610;" or to the Statutes at Large. (See *A Uniform System of Citation,* Harvard Law Review Association, Sections 4:2:3(b), 4:3(b).) And even where amendments are not referred to, it has been held:

> Obviously, a citation to an existing official code section includes all amendments thereto in force. *Jackson v. United States,* 325 F.2d 477, 479 (8th Cir. 1963).

It is true that miscitation per se will not invalidate an indictment in the absence of prejudice, *United States v. Calabro,* 467 F.2d 973, 981 (2nd Cir. 1972), but here the citation is evidence that the wrong law was presented to the grand jury,

which otherwise might well not have indicted. The grand jury's consideration of the evidence under the correct law is crucial; thus it is held that the charge of an indictment may not be amended for that

> deprives the defendant of his right to be tried upon the charge in the indictment as found by the grand jury and hence subjected to its popular scrutiny. *United States v. Beard*, 436 F.2d 1084, 1087 (5th Cir. 1971).

And beyond the citation, we have the additional evidence of the copy of the 1972 statute attached by the prosecutor himself to the indictment. As the photostatic copy reveals, this contains the version of §610 in effect in 1970 plus (obviously from a different source since the format is different) the 1972 definition section, with identifying dates and citations curiously removed, (App. 12), instead of the applicable §591 definitions. Faced with all this, and specifically called upon to explain, the Government failed to provide any satisfactory response, much less to prove that the correct law was used:

> Your Honor, all I can say in that regard is I have spoken to Mr. Turcom who presented the case to the grand jury, and he advises me that he is fully aware the statute was amended in 1972, but beyond that I am not at liberty to discuss the proceedings in the federal grand jury in this District. (App. 69)

As long ago as *Kring v. Missouri*, 107 U.S. 221, 235 (1882), the Supreme Court stated the proscription upon ex post facto prosecution thus:

> No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority before the imputed offense was committed, and which existed as a law at the time.

As recently as *United States v. Binder*, 453 F.2d 805, 808 (2nd Cir. 1971), this Court reaffirmed the principle:

> The *ex post facto* clause erects a *per se* barrier against prosecution by the government for an act legal when done, but later made illegal.

Compare *United States v. Ferrara,* 458 F.2d 868 (2nd Cir. 1972), where the conduct (a conspiracy) began before but continued after the effective law.

The Supreme Court undertook a detailed review of the ex post facto doctrine as it relates to vague legislation in *Bouie v. Columbia,* 378 U.S. 347 (1964), striking down as ex post facto the retroactive judicial construction of a state law. Reasoning first that "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness," and that vagueness in a law cannot "be cured in a given case by a construction in that very case placing valid limits on a statute," the Court reasserted that the "required criminal law must have existed when the conduct in issue occurred". 378 U.S. at 352-354.

And *Bouie* brings us full-circle to the vagueness of §591's definitions, for the 1972 amendment provided a new answer to the question raised: Was the "payment" a "contribution" in 1970? Inevitably the grand jury would answer affirmatively under the 1972 amendment; but under the proper §591 provisions, we submit, the answer would be in the negative, or very much in doubt.

That doubt has infected these entire proceedings, but Mr. Chestnut has been denied the benefit of the interpretation to which he is constitutionally entitled: in the grand jury, the trial jury, and the rulings of the trial court.

Ironies abound in this case. Not the least of them is this: That in the first prosecution for receiving an unlawful contribution in the fifty year history of that proscription, (the first, at least, to be appealed), the Government is either unable or

unwilling to say whether the accusation was brought under the applicable laws. This is astonishing and intolerable. The Constitution, the rudiments of criminal justice, demand more of the Government.

The conviction should be reversed and the indictment dismissed.

VI. IT WAS PREJUDICIAL ERROR TO ALLOW LILLY'S LEGAL OPINION THAT HIS CONTRIBUTIONS VIOLATED 18 U.S.C. §608's $5,000 LIMITATION, AND TO REFUSE TO INSTRUCT THE JURY ON THIS STATUTE.

Lilly's personal check and cash contributions did not, as he was allowed to testify, violate 18 U.S.C. §608's $5,000 limitation, because that section excluded contributions to a "state or local committee," and the evidence was uncontradicted that those payments were to such a committee. The defense objected to the legal opinion, and requested an instruction on the point. Instead the Court charged that evidence of "similar acts and conduct . . . was received solely limited to show the defendant's knowledge and intent." (App. 672-673) This missed the point and could only have misled the jury, for those contributions were *not* similar, and thus they had no probative value as to intent; but the jury was left with the impression that it was illegal for Mr. Chestnut to receive them, and that therefore he was a bad man, predisposed to accept the unlawful *corporate* checks on trial. This is precisely the one ground upon which evidence of other "misconduct" is *not* admissible, even under this Court's inclusory rule. See *United States v. Papadakis*, 510 F.2d 287, 294-95 (2nd Cir. 1975).

Since the Lilly checks and the cash contribution were lawful, under either §608 or §610, it was not the evidence itself which damaged, but Lilly's opinion of illegality; there was no foundation for this opinion, it was demonstrably incorrect, and it invaded the province of the jury. See *Huff v. United States*, 273 F.2d 56, 61 (5th Cir. 1959), reversing a smuggling convic-

tion because a customs inspector was allowed to testify to "his construction and interpretation of the customs laws". The Court said:

> Of course, the Government cannot in this manner be permitted to substitute its witness for the Court in charging the jury as to the applicable law. . . . Nor was the witness' opinion and conclusion admissible as to one of the ultimate facts to be decided by the jury. . . . This testimony was highly prejudicial and necessitates a reversal. . . .

To the same effect is *United States v. Phillips*, 478 F.2d 743, 746 n. 6 (5th Cir. 1973) (error to permit opinion as to question of law or mixed question of law and fact).

The effect of the improper opinion was not remedied, but was indeed exacerbated by the limiting instruction, for the judge told the jury the acts were similar, i.e. inferentially illegal (which they were not) and thus probative of willfulness (which they were not). At the very least the legality under §608 should have been explained to the jury in terms such as requested by the defense (App. 727).

Instead Lilly, the Government's most important witness, was allowed to state a legal conclusion, (attributing guilt to Mr. Chestnut), which was without foundation, was factually and legally wrong, but was nevertheless given the trial judge's tacit (and more than tacit) imprimatur. The error was compounded by introduction of promissory notes, (App. 273-276), suggesting AMPI's improper system of reimbursement, which were altogether irrelevant to the intent issue since it was conceded Mr. Chestnut had no knowledge of that system. In view of the weakness of the evidence, and the vague and confusing law the jury was required to apply, it was prejudicial to allow this damaging conclusion into evidence and to stand uncorrected by proper instructions.

CONCLUSION

This was a misbegotten prosecution. The wrong law was presented to a grand jury in the wrong jurisdiction. The applicable law was monstrously vague and had never been construed as regards receivers of contributions, in all its fifty years. The indictment, with its circuitous theory of guilt, did not state an offense. The evidence proved neither knowledge, nor intent, nor willfulness, nor venue, nor, indeed, a contribution. The improperly venued trial was infected by prejudicial and inadmissible evidence, and by instructions improperly given and instructions improperly omitted.

For these reasons, we respectfully pray that the conviction be reversed with directions to enter a judgment of acquittal, to dismiss the indictment, or to order a new trial venued in the District of Minnesota.

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Charles F. Deutsch, being first duly sworn, states that he is an employe of Review Publishing Company, 287 East Sixth St., St. Paul, Minnesota.

That on the 26th day of August, 1975 1 copies of Appellant's Brief Appeal from United States District Court Southern District of New York

Case No. 75-1268 United States of America, Plaintiff-Appellee, vs. Jack L. Chestnut, Defendant-Appellant.

were mailed by first class mail, postage prepaid, to the following named persons at the addresses shown: Paul J. Curran, U.S. Attorney
Attention: Mr. Eugene F. Lannigan, Esq.
Assistant United States Attorney
Southern District of New York
1 St. Andrews Plaza
New York, New York 10007

Charles F. Deutsch

Subscribed and sworn to before me this 26th day of August, 1975

Mildred M. Seeley

MILDRED M. SEELEY
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Comm. Expires Aug. 24, 1979